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Insurance Class Action Update

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This robust report summarizes two quarters of activity in property and casualty claims class actions. Much has occurred in class actions asserting traditional theories, like labor depreciation and total loss claims, but also newer theories are taking root in class actions against insurers that bear close watching.

Lots of Action in Labor Depreciation Class Actions

Plaintiffs' efforts to certify multi state class actions over labor depreciation claims recently suffered a blow in *Generation Changers Church v. Church Mutual Ins. Co.*, 2023 WL 6206152, No. 3:21-cv-00764 (M.D. Tenn. Sept. 22, 2023). The court first rejected the insurer's motion to dismiss for lack of standing claims asserted by the Tennessee plaintiff on behalf of insureds outside of Tennessee. A few courts in other labor depreciation class actions have granted such a motion [2023 Q1 Report]. The *Generation Changers* court ruled that Rule 23 does not require the named plaintiff to have personal standing with respect to each class member's claim, only his own.

The court also refused to grant judgment on the pleadings on Texas class claims, adopting the analysis of the Fifth Circuit to hold that Texas law would find that the absence of a definition of depreciation and actual cash value in the policy renders it ambiguous. *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700, 706 (5th Cir. 2020).

However, the district court declined to certify a class that includes insureds from six states in which the issue of labor depreciation has not been definitively resolved by the state's highest court or binding regulatory authority. The court reasoned that an Erie analysis for the unsettled states would necessitate state-specific contract interpretation—the standards for which vary state to state—rendering a class action unworkable. For the four states in which labor depreciation is settled law via a decision from the state's highest court or a binding regulation, the court granted certification. The plaintiff has since filed a Rule 23(f) petition with the Sixth Circuit.

Elsewhere, labor depreciation claims survived a motion to dismiss. *Brown v. State Farm Fire and Cas. Co.*, 2023 WL 5599630 (W.D. Mo. Aug. 29, 2023). The court distinguished the allegations in the complaint from the Eighth Circuit's decision that Missouri law did not prohibit labor depreciation. *In re State Farm Fire & Cas. Co.*, 872 F.3d 567, 576 (8th Cir. 2017). Moreover, the court held that to the extent the Eighth Circuit's interpretation of Missouri law conflicted with that of a state intermediate appellate court finding the lack of reference to labor depreciation in a policy to be ambiguous (*Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286, 297, 303 (Mo. Ct. App. 2022)), the outcome in *Franklin* would control. And, one district court ruled that Missouri's ten year statute of limitations applies to labor depreciation claims, rejecting an argument to apply a five year period. *Varney v. American Family Mutual Ins. Co.*, 2023 WL 4033943 (W.D. Mo. June 15, 2023).

Finally, careful crafting of settlement agreements in labor depreciation class settlements may help later. Plaintiffs' counsel in several labor depreciation class actions have begun a strategy of pressing for depositions in one labor depreciation class action of those who performed the same insurer's analysis of claim forms filed in settlement of another labor depreciation class action. *See, e.g., Cortinas v. Liberty Mut. Pers. Ins. Co.*, no. 5:22-cv-00544 (W.D. Tex.); *Glasner v. American Economy Ins. Co.*, no. 1:21-cv-11047 (D. Mass.). Motions to enforce the final judgment approving settlement agreements are pending, to preclude testimony about settlement administration. *See, e.g., Holmes v. LM Ins. Corp.*, No. 3:19-cv-00466 (M.D. Tenn.) (doc. nos. 88, 89); *Huey v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:19cv153 (N.D. Miss.) (doc. no. 90). So far one court in which the depositions were sought granted in part a motion for protective order with regard to a Rule 30(b)(1) deposition of the person who "'directly supervised the persons and/or process for calculating' potential damage and settlement amounts," without prejudice to seeking similar information via a

Rule 30(b)(6) deposition. *Cortinas*, no. 5:22-cv-00544 (Sept. 21, 2023) (doc. no. 54).

Total Loss Valuation Class Actions Still At Center Stage

The Eleventh Circuit delivered a major victory to insurers facing suits that CCC and similar products undervalue total loss vehicles. *Signor v. Safeco Ins. Co. of Illinois*, 72 F.4th 1223 (11th Cir. 2023). The court affirmed summary judgment in the insurer's favor, finding that CCC's valuations comply with a Florida statute defining actual cash value. The specific statutory provision provides, "when comparable motor vehicles are available in the local market area" actual cash value may be based upon "the cost of two or more such comparable motor vehicles available within the preceding 90 days." Fla. Stat. § 626.9743(5). "To sum up," the court wrote, "Safeco's use of the Uniform Condition Adjustment, advertised prices, and the CCC system to calculate the actual cash value of Signor's vehicle complied with the statute."

The Fifth Circuit also delivered a major victory for insurers at the class certification stage. *Sampson v. United Servs. Auto. Ass'n*, No. 22-30351, 2023 WL 6533181 (5th Cir. Oct. 6, 2023). The district court had certified a class of insureds whose CCC total loss valuations were less than NADA's "clean retail" value. The Louisiana total loss statute defined several methods to determine actual cash value, one of which included NADA. The Fifth Circuit reversed, holding that Rule 23(b)(3)'s predominance requirement had not been met. The court of appeals recognized that the statute identified multiple other permissible valuation sources that could potentially be used to determine actual cash value. This, the court recognized, "creates an explosion of predominance issues because [defendant] has the due process right to argue, for each individual plaintiff, that damages should be determined by a different legally permissible method that would produce lower damages than NADA (or no damages at all)." And, the determination of actual cash value was required to establish class wide liability of whether actual injury existed, not just damages.

However, "projected sales adjustment" putative class actions did not fare as well, as district courts in Pennsylvania and Georgia granted class certification. *Drummond v. Progressive Specialty Insurance Company*, No. 21-4479, 2023 WL 5181596 (E.D. Pa. Aug. 11, 2023); *Brown v. Progressive Mountain Insurance Company*, No. 3:21-cv-175-TCB (N.D. Ga. Aug. 3, 2023). In *Drummond*, the court rejected arguments that the individualized nature of vehicle valuation renders commonality and predominance lacking, instead finding that "the putative plaintiffs have framed their breach-of-contract question in a manner that is able to produce "common answers" about a class-wide injury." The court also rejected the insurer's argument that its obligation is to pay actual cash value only, not to use a specific methodology, and instead found "the case turns generally on whether Progressive's use of PSAs violated its contractual obligation to pay the proposed class members the ACV of their vehicles."

Brown similarly rejected an oft-employed merits argument by insurers facing challenges to valuation methodology: the valuation in the settlement payment exceeded the value of another lawful valuation source (such as Kelley Blue Book or NADA), even with the contested projected sales adjustment. Instead, the court dismissed the argument as "just … a defense" and "not relevant at the class certification stage."

Appraisal clauses have historically served as useful tools to defend similar putative class actions, both on the merits and at the class certification stage [2023 Q1 Report; 2022 Q4 Report]. But a recent decision denied an insurer's request to enforce the appraisal process in a projected sales adjustment case because "Plaintiffs' claims go far beyond a dispute over actual cash value." *Williams v. State Farm Mutual Automobile Insurance Company*, No. 22 C 1422, 2023 WL 4106067 (N.D. Ill. June 21, 2023).

Another federal court refused to dismiss total loss valuation claims that allegedly resulted in lower actual cash value payments because of blanket condition adjustments to comparable vehicles. *Dinicola-Ortiz v. Geico Indemnity Co.*, No. 22-6228, 2023 WL 5623237 (E. N.J. Aug. 31, 2023). In doing so, the court confirmed an appraisal award but saved for a later date a decision on what effect the appraisal has on the plaintiff's claims.

Total Loss Tax, Title, Premiums, and Diminished Value Class Actions

Class actions challenging the non-payment of sales tax and regulatory fees for total loss vehicle claims have been swaying towards the insured at the class certification stage. The Fifth Circuit affirmed certification of a class challenging non-payment of sales tax, title fees, and registration fees as part of a total loss vehicle payment. *Angell v. GEICO Advantage Insurance Company*, 67 F.4th 727, 732 (5th Cir. 2023). The court rejected a challenge to the named plaintiffs' standing, regardless of whether not all of the named plaintiffs alleged to be owed each of the types of fees sought.

A district court also certified a class of insureds alleged to be owed title, transfer, and vehicle registration fees. *McCoy v. GEICO Indemnity Company*, No. 20-5597 (ZNQ) (TJB), 2023 WL 2929454 (D.N.J. April 13, 2023). The court found the plaintiff had standing to bring its claims even though payment would be made to the lienholder. Another court granted summary judgment on behalf of a certified class to recover tax, title, and registration fees on total loss vehicles. *Davis v. GEICO Cas. Co.*, Case No. 2:19-cv-2477, 2023 WL 2330234 (S.D. Ohio Mar. 2, 2023). The policy defined "actual

cash value" as replacement cost less depreciation or betterment. Following the Sixth Circuit decision in *Wilkerson*, the court held that replacement costs reasonably include the disputed fees.

Certification of another class of insureds asserting claims for tax, title and registration fees for total losses was affirmed in *SOS v. State Farm Mutual Auto. Ins. Co.*, No. 21-11769, 2023 WL 5608014 (11th Cir. Aug. 30, 2023). The court rejected the argument that pre-certification remediation payments to class members mooted the case, as it did not afford relief to all class members. The court also had no problem with the lower court granting summary judgment as to liability on the named plaintiff's claim on behalf of a class before deciding class certification, a classic one way intervention problem. The appellate court relied on the district court's discretion to determine timing of merits and class certification rulings. Because the ruling on summary judgment established breach of contract, the court of appeals did not have to wrestle with individual questions of liability.

One relatively new theory has cropped up in total loss class actions: a plaintiff claims the insurer is overcharging for premiums by assessing the same premium for vehicles with reconstructed titles as those with clean titles. *Petery v. USAA Casualty Insurance Co.*, No. 5:23-cv-00604 (E.D. Pa. April 11, 2023). A motion to dismiss is pending.

On the brighter side for insurers, one Massachusetts state court denied class certification in a case challenging the non-payment of inherent diminished value. *McGilloway v. Safety Ins. Co.*, No. 1784CV02089-BLS2, 2023 WL 4108693 (Mass. Super. Ct. June 20, 2023). The court found predominance and superiority lacking because "individualized proof, analysis, and findings would be required to determine whether any putative class member's vehicle suffered some amount of IDV and, if so, how much."

New Decisions on New Mexico Uninsured/Underinsured Motorist Coverage

We've previously reported on a number of class actions challenging insurers' practices related to the sale of UM/UIM coverage in New Mexico [1-3Q 2021]. The subject of UM/UIM coverage, particularly how insurers must offer the coverage, has long been a hot-button topic in New Mexico and the subject of considerable jurisprudence.

The New Mexico Supreme Court—in a long-awaited decision—recently held that insurers, in their pre-purchase offers of UM/UIM coverage, must "include a brief discussion of stacking" that "clarifies that an insured who purchases insurance on multiple vehicles and pays multiple premiums would be entitled to stack [UM/UIM] benefits in the event of a covered loss." *Ullman v. Safeway Ins. Co.*, No. S-1-SC-36580, 2023 WL 6386511 (Oct. 2, 2023). The disclosure must also provide "the insured an opportunity to obtain additional information about stacking." Importantly, however, the court held that its new disclosure rule would only apply with "selective prospectivity"—*i.e.*,"to the litigants in the case giving rise to the new rule and thereafter only to parties whose conduct occurs after the announcement." Although imposing a new, pre-purchase disclosure obligation, the court separately reaffirmed that insurers need not obtain a new rejection of UM/UIM coverage when an insured adds another vehicle to an existing policy.

Separately, the court also discussed, but did not conclusively decide, whether insurers are required to offer UM/UIM coverage on a per-vehicle basis as opposed to an all-vehicles or nothing basis. The court agreed that its prior precedent in *Montano v. Allstate* had not resolved the issue, and instead only addressed the requirements an insurer must meet to *preclude* stacking coverages in a multiple-vehicle policy for which the insured pays multiple premiums. But the court reserved judgment as to whether New Mexico's UM/UIM statute, "interpreted in light of the Legislature's clear purpose of encouraging the purchase of UM/UIM insurance," requires that insurers *offer* per-vehicle UM/UIM coverage. It instead held that the lower courts should address this question in the first instance on remand.

Also, the New Mexico Court of Appeals was called upon to consider whether an insurer's premium structure for UM/UIM coverage on a multi-vehicle policy was ambiguous, such that the plaintiff should be entitled to stack UM/UIM coverages across all covered vehicles. *Garcia v. Allstate Fire and Casualty Insurance Company*, No. A-1-CA-38005, 2023 WL 6386578 (Sept. 28, 2023). In *Garcia*, Allstate's UM/UIM offer form gave the plaintiff the option to select either (1) stacked coverage with limits of $25,000/$50,000 for all vehicles on the policy for $168.05, or (2) non-stacked coverage with limits of $25,000/$50,000 for all vehicles on the policy for $89.13. The plaintiff selected the less expensive non-stacked option. But the declarations page listed UM/UIM coverage and premium charges on a vehicle-by-vehicle basis. The plaintiff argued that when multiple premiums are paid, stacked coverage must be provided. The insurer countered that it charged only one premium for one coverage ($89.13), and simply allocated that single premium among the insured vehicles on the declarations page. The appellate court concluded that the declarations page rendered the contract ambiguous as to whether multiple premiums were being charged, and therefore, entitled the plaintiff to stacked UM/UIM coverage.

Estimating Software Class Actions Heat Up

We've previously discussed class actions challenging the use of new construction price settings in estimating software, rather than using a price setting for restoration, service and remodel. [2022 Q2-Q3] The settings allegedly impact labor efficiency settings, and the insurer's practices allegedly artificially lower

actual replacement cost value of damage. In one such case, the insurer has moved for summary judgment, arguing (among other things) that it has no contractual duty to use any particular labor efficiency settings. The plaintiff has moved to certify a nationwide class under the Illinois Consumer Fraud Act, and a Pennsylvania subclass for breach of contract and violation of Pennsylvania statute. *Belotti v. State Farm Fire and Cas. Co.*, No. 3:22-cv-01284 (M.D. Pa.) (doc. nos. 43, 54). Both motions are pending.

Property Damage Claims Based on Broad Estimating Practices Denied Class Cert

In *Hansen v. Country Mut. Ins. Co.*, plaintiff alleged wide ranging theories for underpayment of contents and structural damage claims based on the insurer's practices in preparing estimates and using estimating software. 2023 WL 6291629, No. 1:18-cv-00244, (N.D. Ill. Sept. 25, 2023). The court denied class certification a second time, noting that plaintiff's "myriad common questions are not common to the proposed class as a whole." The court rejected plaintiff's efforts to preclude use of the insurer's review of a sample set of claim files, particularly since plaintiff relied on a sample of claim files to argue consistent underpayments to insureds. Because plaintiffs' "arguments and evidence reveal myriad differences, as to whom the alleged practices affect, whether the practices even occur, and whether, if proven, any practice would establish elements of the class-members' claims", commonality was lacking.

Sales Tax Depreciation Class Action Survives Dismissal

We previously reported on class actions asserting claims based on depreciation of sales tax in calculating actual cash value payments for structural damage claims. [2023 Q1]. In *Pitkin v. State Farm General Ins. Co.*, the court refused to dismiss claims for declaratory relief and under the California Unfair Competition Law, finding the allegations sufficient. No. 23-cv-00924 (N.D. Calif. July 25, 2023) (doc. 40). The court also refused to grant a stay while a state trial court decision, holding that depreciating sales tax is proper, was reviewed on appeal. *Ramyead v. State Farm General Ins. Co.*, No. 20STCV06274, (Cal. Super. Ct. May 16, 2023).

Race Discrimination Class Action for Impact of Adjusting Practices Survives

As previously reported, some policyholders have filed class actions alleging that their property damage claims received greater scrutiny because of their race. [2022 4Q]. In sum, plaintiffs allege that because of the "use of algorithmic tools, Black claimants wait longer and exert more effort while" their claims are processed. *Huskey v. State Farm Fire & Cas. Co.*, 2023 WL 5848164 No. 1:22-cv-07014, (N.D. Ill. Sept. 11, 2023). The court dismissed claims under 42 U.S.C. § 3604(a) and § 3605 of the FHA, along with one plaintiff's claim for injunctive relief, but left intact remaining claims.

Pennsylvania IME Class Action Trimmed

Class claims based on having to attend an IME that resulted in denial of future benefits, before the Supreme Court of Pennsylvania held contractual provisions requiring IMEs to be void, were for the most part dismissed. *Benscoter v. Nationwide Mut. Ins. Co.*, No. 4:22-CV-01142, 2023 WL 5409937 (M.D. Pa. Aug. 22, 2023). Plaintiff alleged improper denial of benefits based on an IME that a later ruling would conclude the insurer had no right to compel. The court granted summary judgment for the insurer on claims for damages under the Pennsylvania Motor Vehicle Financial Responsibility Law, for declaratory relief, and for bad faith. While the court found no evidence was supplied to establish breach of contract under the policy, the court gave the plaintiff another chance to plead a sustainable breach of contract claim.

COVID Refund Class Actions

The past few years we've reported on several class actions seeking pandemic era premium refunds, including one federal court that had certified a class and rejected arguments that refunds of auto insurance premiums for lower casualty risks experienced during the pandemic were barred by the filed rate doctrine. *Day v. Geico Casualty Co.*, 2022 WL 179687 (N.D. Calif. Jan. 20, 2022); 2022 WL 16556802 (N.D. Calif. Oct. 31, 2022). [2022 4Q, Q4 2021-Q1 2022] In a breath of fresh air, one California state court has debunked that theory.

In *Shively v. Wawanesa Gen. Ins. Co.*, the trial court granted summary judgment for the insurer on pandemic premium refund claims, holding that it was not unfair for the insurer to charge premiums at rates previously approved by the Insurance Commissioner. 2023 WL 5509069 (Los Angeles Cty., Calif., Super. Ct. Aug. 22, 2023). In fact, the insurer had no alternative but to use the approved rate: "The conduct of which [plaintiff] complains is, as Wawanesa puts it, 'how insurance works.' . . . Plaintiff, in exchange for her premium payments, contractually shifted to Wawanesa the risks of certain liabilities. After the parties contracted, an event occurred — the COVID-19 pandemic —that reduced Wawanesa's risk. But the fact that conditions changed after contracting does not make Wawanesa's conduct pursuant to the terms of the contract unfair. The pandemic could easily have been a different type of natural disaster that increased the risks that the parties had allocated to Wawanesa." *Id.* at *5.

Class Actions Filed in State Court Seeking Interest on Arbitration Award

Two class actions have been filed in Massachusetts alleging that insurers failed to pay interest on arbitration awards involving underinsured and uninsured drivers. *Dayton v. Progressive Direct Insurance Co.*, No. 2384CV01605; *Tapia v. The Hanover Insurance Group Inc.*, No. 2384CV01604 (Suffolk County, Mass., Superior Court). The claims appear to be based on a 2013 class settlement that purportedly required insurers to pay post-award interest from the date of the award to payment, plus three days.

Insurer's Burden on Removal of Class Claims Sharpened

A court of appeals *sua sponte* questioned whether CAFA jurisdiction existed over a Montana class action asserting coverage of collection fees and interest on medical bills, which had been removed to federal court. *Moe v. GEICO Indem. Co.*, 73 Fed. 4th 757 (9th Cir. 2023). While a removing defendant need only plausibly allege that the amount in controversy has been met, when the asserted amount in controversy is challenged or questioned, "more is required."

If the complaint and nature of the claims are not evident that the class seeks in excess of $5 million, the defendant must provide evidentiary proof that the amount in controversy is met. The appellate court remanded for proceedings to determine the amount in controversy.

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